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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 562

IN THE MATTER OF:
AMERICAN SOUTHERN PUBLISHING COMPANY,
Bankrupt,
GEORGE LEWIS BAILES, JR., the Trustee,
Petitioner,
versus
THE FIRST NATIONAL BANK OF MOBILE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

The decisions below dealt with and determined the status of certain books stored in an independent warehouse in Birmingham, Alabama (Publishers' Warehouse Division of Ebsco Investment Services, Inc., herein called Warehouse). Shortly after the initial petition in this proceeding (initially Chapter XI but later converted to straight bankruptcy) was filed on October 7, 1966, the Trustee claimed that at the time the petition was filed the Bankrupt, a publisher doing business approximately sixty miles from Birmingham in the town of Northport, was in constructive possession of the warehoused books. The First National Bank of Mobile (Bank) claimed that the books had been pledged to the Bank as collateral security. Acknowledging the claims of each other, the Trustee and the Bank with the approval of the Referee entered into a stipulation that the books would be sold and the sale proceeds would be deposited in a special account with the Bank, all without prejudice to the parties' rights to decide their controversy as though the books were still stored at the Warehouse, including the right of the Bank to object to the jurisdiction of the bankruptcy court.

This case originated when the Trustee later filed a turnover proceeding against the Bank to require the Bank to deliver to the Trustee the funds derived from the sale of the books. The Bank, claiming that the books had been pledged as collateral security, objected to the Referee's summary jurisdiction. After a hearing the Referee overruled the Bank's objection to summary jurisdiction and later on the same evidence ordered the Bank to turn over the funds. The District Court upheld the Referee. The Bank appealed, and the Fifth Circuit Court of Appeals reversed, holding that the Bankrupt did not have constructive possession of the books as they were being held by the Warehouse subject to the order of the Bank. The opinion of the Fifth Circuit stated that its ruling was "without prejudice to

the resolution of the proper disposition of the contested funds in a plenary proceeding."

With respect to the key issue of possession the parties have advanced conflicting contentions. The Trustee maintains that the initial relationship established by the depository contract between the Bankrupt and the Warehouse, whereby the Warehouse held the Bankrupt's books as its "trustee" and "agent," was never changed. The Bank maintains that the relationship was changed by a pledge arrangement worked out among the Bankrupt, the Warehouse, and the Bank during the several months prior to the filing of the initial petition on October 7, 1966.

In view of these conflicting contentions, we think it is desirable to list the developments which occurred in connection with the pledge arrangement and which we feel changed the relationship between the Warehouse and the Bankrupt from what it initially was. The following developments, which were proved by the undisputed evidence (mostly documents but some undisputed and uncontradicted oral testimony), occurred in connection with the pledge arrangement:

(1) The Bankrupt sent to the Bank on June 25, 1966, a certified inventory of the Bankrupt's books held by the Warehouse as of June 24, 1966. At the Bankrupt's request the certified inventory, which the parties referred to in their correspondence and in the collateral notes as a "receipt," was prepared by the Warehouse on June 24, 1966.

(2) The Bankrupt wrote the Warehouse on July 7, 1966, that a "working agreement" had been made with the Bank "for a loan and as a form of collateral we made a consignment of our inventory now warehoused in Publisher's (sic) Warehouse."

(3) On July 19, 1966, the Bankrupt made the Bank a loss payee on the fire insurance covering the warehoused books.

(4) The Bank wrote the Warehouse on July 21, 1966, asking the Warehouse to recognize the Bankrupt's assignment of the "receipt" to the Bank and further stating: "What we are trying to accomplish is that we want to know that these books will not be moved out except on order confirmed by us."

(5) On August 19, 1966, the Warehouse wrote a letter to the Bank which was signed by the Bankrupt prior to mailing to signify its approval. The letter from the Warehouse stated: "We hereby agree, to the extent we can legally do so, that we will not ship any more of said books from our warehouse without your consent." A list of the warehoused books on hand was attached to the letter.

(6) Between August 22 and September 30, 1966, the Bankrupt executed a number of collateral promissory notes in favor of the Bank which stated that the notes were secured by a pledge of the warehoused books. The notes had attached to them a copy of the certified inventory prepared by the Warehouse on June 24, 1966 showing the dollar volume of the warehoused books as of that date and itemizing the books by title and quantity.

(7) After it became obvious to the Warehouse that it would be burdensome to obtain the Bank's consent in connection with small orders from individual teachers for only a few books, the three parties (Bankrupt, Warehouse and Bank) executed a letter-agreement of September 12, 1966, whereby consent of the Bank remained necessary except for very small shipments,

the payments for which would be made to the Warehouse and then remitted by the Warehouse to the Bank. As the Warehouse's manager testified, such orders represented "just a small percentage of the sales."

(8) On September 6, 1966, and again on September 17, 1966, when the Bankrupt itself wanted some of the warehoused books, the Bankrupt wrote the Bank requesting that the Bank give its consent to the Warehouse so that the Warehouse would ship some of the books back to the Bankrupt.

(9) On September 21, 1966, the Bank wrote the Warehouse, with a carbon copy to the Bankrupt, authorizing the Warehouse to ship the requested books to the Bankrupt. As to the necessity of the Bank's consent, the manager of the Warehouse testified at the hearing as follows: "I would not make shipment until I received a letter from [the Bank's president] in Mobile stating to release them to them and after I had received the letter from him, we made shipment to [the Bankrupt] in Northport, Alabama."

(10) On September 26, 1966, the Bankrupt wrote the Bank asking the Bank to give its approval to the Warehouse so that a shipment of books could be made to a purchaser.

(11) On September 27, 1966, in response to the Bankrupt's letter of September 26, the Bank wrote the Warehouse, with a carbon copy to the Bankrupt, stating: "This will authorize you to deliver these books."

(12) On September 28, 1966, after the Warehouse received the above letter from the Bank, the Warehouse shipped the books to the purchaser.

It was under this arrangement that the Bankrupt, the Bank, and the Warehouse were working when the initial petition was filed on October 7, 1966.

ARGUMENT

I. REPLY TO TRUSTEE'S FIRST ARGUMENT

The Trustee's first argument is based upon what the Trustee thinks is an inconsistency in the opinion below, namely that the question of possession was resolved against the Trustee and yet the opinion states that "(t)his ruling is, of course, without prejudice to the resolution of the proper disposition of the contested funds in a plenary proceeding." The Trustee first states (and we think correctly) that, although the procedural holding of the opinion is that summary jurisdiction was not appropriate, the finding that the Bankrupt did not have constructive possession of the books, which was essential to the holding, will be binding as between the parties in any subsequent proceeding in which the question of possession of the books is present. Since the Fifth Circuit has ruled that the Bankrupt did not have constructive possession of the books but also has stated that this ruling is to be "without prejudice to the resolution of the proper disposition of the funds in a plenary proceeding," the Trustee argues that a "novel jurisdiction enigma" exists.

The Trustee makes two separate suggestions, which are somewhat contradictory, as to why the Fifth Circuit fell into what the Trustee claims is the inconsistency which constitutes the "enigma." One suggestion (which like the other is made by questions rather than by declaratory statements) is that the Fifth Circuit was negligently unaware of the principles or res judicata and collateral estoppel which would have the effect of making conclusive as between the parties the finding that the Bankrupt did not have constructive possession. The other suggestion is that the "without prejudice" provision of the opinion indicates that the Fifth Circuit must really have meant to decide the possession question in favor of the Trustee, otherwise the decision would not be "without prejudice" to the Trustee. Both of these suggestions sell the Fifth Circuit short.

The obvious meaning of the "without prejudice" provision, which the Trustee has misread, is that the dismissal of the summary proceeding below does not also work a dismissal of the Trustee's plenary suits. The Trustee will still be able to seek the relief sought in the plenary suits so long as the relief and the attendant findings and conclusions are not in conflict with the Fifth Circuit's finding that the Bankrupt did not have constructive possession of the books.

Since the plenary suits have been mentioned in the Trustee's petition and since the Fifth Circuit was fully aware of their nature (the Trustee having attached copies of the complaints to a brief filed with the Fifth Circuit), we believe we are justified in informing the Supreme Court of certain pertinent facts concerning the plenary suits. They seek to set aside the Bank's (alleged) pledge as a voidable preference, and they were filed (one in state court and one in federal court to be sure of appropriate jurisdiction) as precautionary measures to guard against the running of the statute of limitations. At the time they were filed the Referee in this proceeding had already overruled the Bank's objection to summary jurisdiction and had already rendered a decision on the merits ordering the Bank to turn over the funds.

The clear effect of the Fifth Circuit's "without prejudice" ruling, which is not enigmatic in any way, is that the finding by the Fifth Circuit that the Bankrupt did not have constructive possession and the resultant order that the turn-over petition be dismissed will not prevent the Trustee from being able to prosecute his plenary suits which seek to set aside the Bank's pledge as a voidable preference.

(One of the Trustee's statements in the argument implies a concern that the Bank in the plenary suits, in an attempt to defeat their jurisdiction, might reverse its position by claiming that it had no pledge. Later in the argument the Trustee seems

to satisfy himself that the principles of res judicata and collateral estoppel would not allow the Bank to make this reversal. However, in case any doubt still remains, the Bank hereby assures the Trustee that it will make no claim that it had no pledge.)

II. REPLY TO TRUSTEE'S SECOND ARGUMENT

The Trustee's second argument, similar to the first, is that the Fifth Circuit has denied the Trustee due process because the holding that the Bankrupt did not have constructive possession of the books has foreclosed the Trustee from being able in the plenary suits to contend that constructive possession did exist. The Trustee argues that this "denial of due process" by the Fifth Circuit was unintended in view of the statement in the opinion below that the ruling was to be "without prejudice to the resolution of the proper disposition of the contested funds in a plenary proceeding."

We again point out, as was done in more detail in our reply to the Trustee's first argument, that the relief sought by the plenary suits is to set aside the pledge as a voidable preference. The purpose of the plenary suits was fully known by the Fifth Circuit because copies of the complaints were attached to one of the Trustee's briefs and because the Trustee in the brief described the nature of the suits.

Since the Fifth Circuit knew that the plenary suits sought to set aside the pledge as a voidable preference, the Trustee is clearly in error in claiming that the Fifth Circuit unintentionally denied the Trustee due process by foreclosing the Trustee from being able to litigate the question of constructive possession again in the plenary suits. It is obvious that the intent of the "without prejudice" provision in the Fifth Circuit's opinion was that the dismissal of the turn-over proceeding would not prevent the Trustee from maintaining the plenary suits to set aside the pledge as a voidable preference. It is equally obvious that the

Fifth Circuit did not intend by the "without prejudice" provision to permit the Trustee to litigate again the validity *vel non* of the pledge, although the Trustee's claim of denial of due process is based upon the contention that such was intended.

III. REPLY TO TRUSTEE'S THIRD ARGUMENT

The Trustee's third argument is entirely predicated upon the proposition that "the Fifth Circuit failed to find from undisputed facts that the Bank had even constructive possession." From this predicate the argument is made that summary jurisdiction is appropriate notwithstanding the Fifth Circuit's finding that the Bankrupt did not have constructive possession. In the course of the argument a number of cases from other circuits, which the Trustee states are in conflict with the opinion below, are cited for the principle that summary jurisdiction exists as to property in the hands of a third person who makes no claim if the other claimants to the property do not have constructive possession.

The Trustee is plainly wrong in his predicate. A number of statements in the opinion make it clear that the Fifth Circuit found the Bank to have constructive possession. Let us examine some of these statements. First, speaking of the Bank's contention with respect to summary jurisdiction, the court notes that the Referee himself found the Bank's claim to be substantial. Then this statement is made: "A substantial claim alone does not, however, prevent summary jurisdiction: the question is possession." Next the court notes that the Referee and the District Court felt that the Bank had "only a negative veto power." Then this paragraph appears:

> "The proposition, if established factually, that property in the physical possession of a bankrupt's agent or bailee is in the constructive possession of the bankrupt would sustain summary jurisdiction. Here it is without dispute that bankrupt could not take actual possession of the

> books. The warehouse, under the agreements, could surrender possession to the bankrupt only with the approval of the bank. *The books were being held by the bailee subject to the order of the bank.*" (Emphasis added)

Then finally this statement is made concerning the books: "In bankrupt's words, they had been consigned to the bank as collateral [the Bankrupt's president, a layman, having stated in a letter to the Warehouse that a "working arrangement" had been made with the Bank and that "as a form of collateral we made a consignment of our inventory" now in the Warehouse]."

It is inescapable that the Fifth Circuit found the Bank to have constructive possession of the books. What else could be meant by the statement "(t)he books were being held by the bailee subject to the order of the bank."? See *In Re Cross*, 244 Fed. 844 (N.D.N.Y. 1917). The statement is tantamount to a statement that the bank had constructive possession. This especially is the case when one considers the preceding statement, namely that with respect to the Bank's claim "the quest[illegible]s possession," that t[illegible] the District Court reasoned that the Bank had [illegible] veto power," and that "it is without dispute that bankrupt could not take actual possession of the books." Additional proof of the court's finding that the Bank had constructive possession is the statement, adopting the language used in one of the letters from the Bankrupt's president to the Warehouse, that the books had been "consigned" to the Bank as collateral. In reaching its conclusion the Fifth Circuit was adhering to the following principle of construction which appears in *Citizens' Bank & Trust Co. vs. Thornton*, 174 Fed. 752, 761 (5th Cir. 1909):

> "It is the duty of the courts to construe and enforce pledges according to the intent of the parties as gathered from the instrument of pledge or deposit, and the subject-matter and course of dealing to which it relates."

The cases cited by the Trustee have absolutely no bearing on the proposition upon which the Trustee's argument is predicated, namely that the Fifth Circuit failed to find that the Bank had constructive possession of the books.

In connection with constructive possession and pledges, we wish to point out several basic principles of law. A valid pledge exists when the pledged property is in the hands of a third person who has been notified of the pledge by either the pledgor or the pledgee. 41 AM. JUR. *Pledge and Collateral Security* §19 (1956); RESTATEMENT, SECURITY §8 (1941); *Pierce vs. National Bank of Commerce*, 268 Fed. 487 (8th Cir. 1920). The third person can even be the agent or employee of the pledgor. 41 AM. JUR. *Pledge and Collateral Security* §20 (1956).

IV. REPLY TO TRUSTEE'S FOURTH ARGUMENT

The Trustee's fourth argument is that the Bank's claim is insubstantial because the Bank did not have "such possession as to signify 'to the world what property was and what property was not pledged.'" Hence, the argument concludes, summary jurisdiction is appropriate even though the Bankrupt did not have constructive possession of the books at the time the initial petition was filed on October 7, 1966.

Our first reply to the argument concerning the insubstantiality of the Bank's claim is that the Referee himself, although he held summary jurisdiction was appropriate, conceded as a matter of law that "(t)he Bank, as of October 7, 1966, had more than a merely colorable contention or claim that it had a security interest in the books . . ." (page A-21 of the Petition). The Referee then went on to hold that the Bankrupt had constructive possession of the books, a holding diametrically contrary to that of the Fifth Circuit. We submit that the Trustee's argument that the Bank's claim is insubstantial is severely undercut by the Referee's own conclusion of law that the Bank had more than

a merely colorable contention or claim.

Our further reply is that the Trustee, in arguing the Bank's claim to be insubstantial, is confusing two different pledge situations. Let us examine these two situations before considering the specifics of the Trustee's argument.

One pledge situation, which is vastly different from the case at bar, exists when the pledged property remains on the premises of the pledgor-debtor. Field warehousing arrangements and factoring arrangements are characteristic of this type of pledge. Among the pertinent considerations are whether the pledgor-debtor had access to and dominion over the property, whether adequate fences and barriers existed, whether adequate signs were present to give notice of the pledge, and the like. In such cases the key issue is whether the creditors of the pledgor-debtor might have been deceived by the existing circumstances and by the pledgor-debtor's apparent ownership of the property.

The other pledge situation, of which the case at bar presents an example, exists when the pledged property is in the actual possession of a third person. (Of course, there is a third pledge situation which occurs when the property is in the actual possession of the pledgee-creditor, but this is not pertinent to our case or to the arguments made by counsel.) The authorities fully recognize that a valid pledge can exist when the pledged property is in the possession of a third person. RESTATEMENT, SECURITY §8 (1941); 41 AM. JUR. *Pledge and Collateral Security* §19 (1956); *Pierce vs. National Bank of Commerce*, 268 Fed. 487 (8th Cir. 1920). It is also well established that a valid pledge can exist even though the third person holding possession of the pledged property is the agent of the pledgor-debtor. 41 AM. JUR. *Pledge and Collateral Security* §20 (1956).

Different rules pertain to a pledge of property which, on the one hand, remains on the pledgor-debtor's premises, and a pledge

of property which, on the other hand, is in the possession of a third person. The case of *Pierce vs. National Bank of Commerce, supra,* explains these rules and the reasons for them. The following language is relevant:

> "One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensible attribute of a valid pledge, is that such a pledge is indispensible to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the possession and control of a third party. On this account, probably, the authorities disclose the fact that in cases of the second class [those in which the property pledged was at the time of the alleged pledge in the actual possession or control of some third party]; of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has continued in strength and breadth, until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of the third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession." 268 Fed. 492, 493.

The Trustee, confusing the two types of pledge situations, relies almost entirely upon cases in which the pledged property remained in the actual possession of the pledgor-debtor, as an examination of the cases will reveal. In *Security Warehousing*

Co. vs. Hand, 206 U.S. 415 (1907) there was a field warehousing situation. The field warehousing company leased a portion of the bankrupt's premises from the bankrupt, but the bankrupt continued to occupy the premises and continued to have actual possession of the property even after warehouse receipts were issued. In *Whitney vs. Wenman*, 198 U.S. 539 (1905) the property, which was goods and merchandise, remained on the premises of and under the control of the debtor. Although the debtor leased a few sales rooms to the warehouse company for $1.00 a year, the debtor still continued to exhibit the goods and merchandise and to handle them as beforehand. (It should be noted that in this case the holding was that there was plenary jurisdiction; the court did not even undertake to determine whether summary jurisdiction would have been appropriate.) In *Sweetnam vs. Edmund Wright Ginsberg Corporation*, 128 F.2d 1 (2nd Cir. 1942) there was an alleged factoring arrangement on the premises of the bankrupt. Inside the bankrupt's plant, consisting of thirty buildings on a fifteen acre site, about five of the buildings were utilized by the factor. However, the bankrupt continued to have access to these buildings. In *Casey vs. Cavaroc*, 96 U.S. 467 (1878) the securities, which were the property allegedly pledged, remained in the actual possession and control of the debtor inside the debtor's banking house, and this fact was the basis of the court's decision that a valid pledge did not exist. The concluding remarks of the court make it obvious that the pledge would have been valid had the property been in the actual possession of "a third person agreed upon by the parties." The concluding remarks are (page 491): "On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the parties, and of actual possession and control in the pledgor, we feel compelled to hold that the [creditor had no pledge valid as against third persons]." The cases of *Corn Exchange National Bank & Trust Co. vs. Klauder*, 318 U.S. 434 (1943) and *Benedict vs. Ratner*, 268 U.S. 353 (1925) dealt not with pledges but with accounts receivable

financing, and they, therefore, are not relevant. The case of *Lindsey-Robinson & Company vs. Grady*, 282 F.2d 607 (4th Cir. 1960) was not a pledge case either; the security device considered by the court was a chattel mortgage.

The Trustee's argument, which claims that the decision below "will shake the purpose and foundation of recording statutes," fails to realize that the principles of field warehousing and factoring do not apply when the pledged property is not in the actual possession of the pledgor-debtor but is in the actual possession of a third person. The reason, as was expressed in the case of *Pierce vs. National Bank of Commerce, supra*, is that when the property is in the actual possession of a third person, creditors are not likely to be misled by the pledgor-debtor's apparent ownership, as might be the case if the pledged property were still on the premises of the pledgor-debtor. As to the Trustee's claim that the decision below "will shake the purpose and foundation of recording statutes," we remind the Trustee that recording statutes historically have been inapplicable to pledges, which are accomplished by possession, including possession by third persons. As was stated in the case of *Union Bank & Trust Company vs. Azar*, 316 F.2d 433 (5th Cir. 1963): "Recording is constructive notice. So also is possession."

Since the books in the case at bar were stored not on the premises of the pledgor-debtor but in an independent warehouse approximately sixty miles away, the principles governing pledges of property remaining on the premises of the pledgor-debtor are inapplicable and do not render the Bank's claim insubstantial. To the contrary, the substantiality of the Bank's claim, which the Referee himself acknowledged, is supported by the principles of law which permit valid pledges to exist when the property is in the possession of a third person who is given notice of the pledge, and is supported by the pertinent facts of this case, namely that notice was given to the third person of the pledge,

that the third person made an acknowledgment to the pledgee, and that the third person took action with respect to the property only in response to correspondence from the pledgee.

V. REPLY TO TRUSTEE'S FIFTH ARGUMENT

The Trustee's fifth argument is that the decision below thwarts the policy of Congress, expressed in the Bankruptcy Act, favoring efficient and inexpensive administration of bankruptcy cases. The Trustee contends that trustees in bankruptcy sometimes are forced to "thrust and probe" to determine whether summary jurisdiction exists, and if it does not, "they must start over in a plenary proceeding."

This argument overlooks the fact, recognized by the Supreme Court, that Congress has not provided, although it has the power to do so, that bankruptcy courts shall have summary jurisdiction to determine the validity of substantial adverse claims to property not in the bankrupt's possession. See *Cline v. Kaplan*, 323 U.S. 97 (1944). In *Taubel-Scott-Kitzmiller Co. vs. Fox*, 264 U.S. 426 (1924), in which it was held that summary jurisdiction was not appropriate, the following language appears:

> "Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount. Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is. Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred, whether through possession of the res or otherwise, shall be exercised by summary proceedings and to what extent by plenary suit. But Con-

gress did not, either by §2, §23 of the Bankruptcy Act of 1898 or any other provision of the act, confer generally such broad jurisdiction over claims by a trustee against third persons." 264 U.S. 430, 431.

This language also appears:

"Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60 and under subdivision c of §70. *But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim.*" (Emphasis added) 264 U.S. 433, 434.

The Bankruptcy Act itself, §2a(7), indicates this limitation on summary jurisdiction.

The Trustee's argument, which stresses "the Congressional purpose for efficient, expeditious and inexpensive bankruptcy administration," not only fails to take into account that Congress has not provided for summary jurisdiction over substantial adverse claims when the bankruptcy court lacks possession, but also fails to take into account the test for determining when a claim is substantial so as to require plenary jurisdiction. The test appears in the following language from the case of *Harrison vs. Chamberlin*, 271 U.S. 191 (1926):

"Without entering upon a discussion of various cases in the Circuit Courts of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention

> 'discloses a contested matter of right, involving some fair doubt and reasonable room from controversy,' *Board of Education v. Leary, supra,* 527, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense . . . .
>
> "In the present case it clearly appears that the validity of the respondent's claim depended upon disputed facts, as to which there was a conflict of evidence, as well as a controversy in matter of law. Its determination involved 'fair doubt and reasonable room for controversy' both as to fact and law. It was therefore substantial, and not merely colorable; and its merits could only be adjudged in a plenary suit." 271 U.S. 194, 195.

The case at bar, clearly being one involving a substantial adverse claim against property not in the Bankrupt's possession, is not the type of case for which Congress has provided that summary jurisdiction exists.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Massey Bedsole, Counsel for Respondent, hereby certify that three copies of the foregoing brief have been served upon R. Clifford Fulford, Esq., Counsel for Petitioner, by mailing the same, postage prepaid, to him at his office at 433 Frank Nelson Building, Birmingham, Alabama 35203, and that with such service all parties required to be served have been served.